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Nos. 02-500, -506

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In The
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY and TEXACO, INC.

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

SHELL OIL COMPANY and UNION OIL COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE PETITIONERS

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The American Petroleum Institute ("API") respectfully files this brief *amicus curiae* in support of petitioners Atlantic Richfield Company and Texaco, Inc. in Case No. 02-500 and petitioners Shell Oil Company and Union Oil Company in Case No. 02-506.[1] Because both of the petitions arise out of the same decision of the U.S. Court of Appeals for the Ninth Circuit and because the petitions raise substantially the same issue, API is filing this *amicus* brief in support of both petitions.[2]

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. API's members have been identified as potentially responsible parties at contaminated sites across the country pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), and have participated in cleaning up many such sites. Moreover, API's members have undertaken various activities for and at the direction of the United States and instrumentalities of the federal government. Therefore, API and its members have a substantial interest in the standards for liability for cleanup costs under CERCLA. In particular, API and its

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[1] No counsel for any party has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief.

[2] Written consent has been obtained from counsel for all petitioners and the respondent for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the Clerk's Office.

members have a strong interest in the standards for determining the extent of the federal government's liability for the costs of cleaning up contamination at numerous sites throughout the country that are associated with wartime and other activities performed by industry on behalf of the United States.

SUMMARY OF THE ARGUMENT

The Court should grant the writs because the central issue raised in both petitions is a question of fundamental national importance that should be decided by this Court. Both petitions arise out of the Ninth Circuit's decision in *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) ("*Shell*"), in which the court held that the United States was not liable under CERCLA as an "arranger" for certain costs of cleaning up the McColl Superfund Site in Fullerton, California.[3] The court reached this conclusion despite the federal government's extensive involvement in the production of aviation fuel during World War II that resulted in the generation of the waste material disposed of at the McColl Site, and the government's effective foreclosure of other options for managing the waste.

The Ninth Circuit's ruling is of critical importance. First, the precedent established by the ruling could have

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[3] The United States conceded that it had arranged for the disposal of waste at the McColl Site that was associated with the production of benzol (which was in turn used in the production of aviation gasoline), and therefore was liable under CERCLA for the costs of cleaning up such waste. *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018, 1024 (C.D. Cal. 1998). The benzol-related waste constituted 5.5% of the total waste at the McColl Site. *Id.* The petitions in this case relate to the costs of cleaning up the "non-benzol" waste at the Site.

important impacts on the scope of "arranger" liability under CERCLA generally, as well as on the extent to which the federal government will be required to contribute to the cost of cleaning up historic contamination caused by activities undertaken by private parties on behalf of and at the direction of the United States. The decision will in many cases determine who will have ultimate responsibility for paying the billions of dollars that have been and will be spent in cleaning up numerous sites across the country.

In addition, the Ninth Circuit's decision to limit the scope of the federal government's liability for the environmental consequences of activities in which the government was extensively involved and which were being undertaken for its benefit will undoubtedly affect future commercial relationships between industry and the United States. The decision creates a significant and inequitable risk of liability for industries that supply the United States with goods and services urgently needed in time of war or other national emergencies. The decision could in many instances force industries to accept the risk of such liability, despite its inequity, because the alternative of refusing to undertake work that serves a vital national interest is simply untenable or even unavailable. For these reasons and the reasons set forth in the petitions, the Court should grant the writs to provide direction to the lower courts in addressing these issues of fundamental national importance.

REASONS FOR GRANTING THE WRITS

I. THE NINTH CIRCUIT RULING WILL HAVE A SUBSTANTIAL IMPACT ON THE SCOPE OF LIABILITY UNDER CERCLA

A. The Scope of CERCLA "Arranger" Liability Potentially Affects the Allocation of Responsibility For Billions of Dollars in Cleanup Costs

The decision of the Ninth Circuit will have a significant impact on parties who face potential liability for the costs of cleaning up thousands of contaminated sites across the country. In particular, the Ninth Circuit's ruling will have an immediate and direct impact on the scope of liability under section 107 of CERCLA, 42 U.S.C. § 9607, for those who are alleged to have arranged for the disposal of hazardous substances at a site. In this case, the Ninth Circuit ruled that the United States did not arrange for the disposal of certain hazardous substances at the McColl Site and therefore should not be held responsible for cleaning up the vast majority of the contamination at this site. The court based its decision on the grounds that the U.S. neither owned the materials used in the manufacturing process that generated the waste nor exercised actual control over the waste disposal process. *Shell*, 294 F.3d at 1056-57. In doing so, the court rejected a test for imposing "arranger" liability on the basis of the authority to control the processes related to the generation and disposal of waste or the exercise of extensive indirect forms of control over such generation and disposal. Thus, the Ninth Circuit adopted a very narrow view of "arranger" liability that is sharply at odds with the rulings of other federal appellate courts. *See, e.g., United States v. TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995)

("*TIC*"). The impact of the ruling will be to effectively exempt certain types of parties from CERCLA liability in many cases, including those parties that exert substantial influence over the disposal of hazardous waste or have the authority to control such disposal but who do not exercise such control in ways that are direct and overt.

The ruling will clearly affect the allocation of CERCLA liability at sites within the Ninth Circuit. In addition, the Ninth Circuit's decision can be expected to serve as a precedent for courts in other circuits that have not yet definitively established standards for determining the scope of "arranger" liability. Even in those circuits where existing case law sets forth standards for "arranger" liability that conflict with the Ninth Circuit's holdings in this case, the analysis in *Shell* may nevertheless influence lower courts, for example, through the Ninth Circuit's narrow reading of precedents from other circuits. In any event, parties assessing their potential liability as arrangers in other circuits will be forced to weigh the potential influence of the Ninth Circuit's decision as indicating a trend in the case law toward a narrow view of "arranger" liability. Thus, the impacts of the Ninth Circuit decision could be felt far outside that court's jurisdiction.

The potentially dramatic impact of the Ninth Circuit's ruling in this case is underscored by the potentially enormous cost of the cleanups involved at contaminated sites to which the Ninth Circuit's ruling could apply, which could easily total billions of dollars. As the U.S. Court of Appeals for the Sixth Circuit has observed, "[w]ho bears the burden for hazardous waste cleanup costs is an issue of great consequence" in light of the steadily rising costs of cleaning up these contaminated sites. *Centerior Serv. Co. v. Acme Scrap Iron*

& Metal Corp., 153 F.3d 344, 349 n.9 (6th Cir. 1998) (noting that the average cost of cleanup at a CERCLA site had reached 25 to 30 million dollars).

The impacts of the Ninth Circuit's ruling that the United States is not liable for the costs of cleaning up contamination associated with the production of materials for the war effort will be felt most directly in cases involving the cleanup of other contaminated sites related to the production of materials by industry for the U.S. during both World Wars and other national emergencies. These activities involved not only the production of fuels, but also range from the manufacture of military equipment to the mining of necessary minerals. For example, this Court has previously examined the extensive involvement of the War Production Board ("WPB") in the mining industry as part of the nation's mobilization efforts during World War II. *See United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (claim for taking of private property resulting from WPB order directing the shutdown of certain gold mines). In fact, the scope of the WPB's authority was "astonishing in its breadth" and extended to many aspects of the American wartime economy. Nancy Perkins Spyke, *From War Strategy to Waste Strategy: The Validity of Government CERCLA Liability for War Production Site Cleanups*, 4 N.Y.U. Envtl. L.J. 263, 267 (1995) ("*War Strategy*"). *See also* Michael T. Janik & Michael Reis, *CERCLA Claims Against the Government: Rediscovering World War II Contracting Rules*, 66 Fed. Cont. Rep. (BNA) 207, 213-14 (1996) (reviewing the "extraordinary new world of federally ordered limitations, schedules, quotas, and employment rules" created between 1942 and 1945). The exercise of this authority led to the "direction and regulation of the industrial effort by the Federal Government, on a scale

and of an intensity unprecedented in the annals of our nation." John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. 1, 4 (1944) ("*War Production Board*").

The extensive involvement of the federal government in war production activities has already given rise to a number of cases involving claims for recovery of the costs incurred in cleaning up the hazardous waste generated by these efforts. *See, e.g., FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) ("*FMC*") (liability for cleanup of wastes associated with rayon production); *E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F.3d 479 (D.C. Cir. 1998) (zinc mining) ("*East Bay*"); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002) (synthetic rubber production); *Elf Atochem N. Am. v. United States*, 914 F. Supp. 1166 (E.D. Pa. 1996) (production of poison gas). These claims also extend to sites that were contaminated as a result of production of materials for other war efforts. *See, e.g., United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (production of Agent Orange for use in Vietnam). Given that "the number of private sites that could contain wastes derived from war production activities is potentially enormous," *War Strategy*, 4 N.Y.U. Envtl. L.J. at 269, the number of such claims can be expected to increase in the future.

In all of these cases, the courts have been or will be called upon to determine whether the costs of war should be placed solely on individual companies contributing to the war effort or should instead be shared by society as a whole. The latter result has been held by the U.S. Court of Appeals for the Third Circuit to be "neither untoward nor inconsistent with the policy underlying CERCLA." *FMC*, 29 F.3d at 846. The Ninth Circuit itself recognized

in this case that cleanup costs from wartime activities should properly be seen "as part of the war effort for which the American public as a whole should pay." 294 F.3d at 1060. Nevertheless, the Ninth Circuit held that the United States had no responsibility for cleaning up the vast majority of the contamination at the McColl Site, thereby establishing a precedent that places the bulk of cleanup costs from wartime activities on individual companies rather than on society as a whole.

The number of potentially contaminated sites associated with wartime activities and other defense-related efforts is suggested by the federal government's own cleanup activities. The Department of Defense has already investigated or otherwise addressed contamination at over 25,000 sites associated with military or other defense-related activities, including nearly 3,000 Formerly Used Defense Sites which were previously owned, leased or operated by the Department of Defense. U.S. Dep't of Defense, *Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress* 33 (2002). The Department of Defense has estimated that the cost of cleaning up the Formerly Used Defense Sites alone may be $15 to 20 billion. General Accounting Office, *Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup* 1 (2002).

Similarly, the Department of Energy has undertaken extensive efforts "to mitigate the risks and hazards posed by the legacy of nuclear weapons production." Office of Envtl. Mgt., U.S. Dep't of Energy, *Linking Legacies: Connecting the Cold War Nuclear Weapons Production Processes to Their Environmental Consequences* 1 (1997). Nuclear weapons production activities have resulted in a legacy of 1.5 billion cubic meters of

contaminated water and 73 million cubic meters of contaminated solid media. *Id.* at 71. This contamination is found, among other places, at sites that are being cleaned up by the U.S. Army Corps of Engineers (the "Corps") under the Formerly Used Sites Remedial Action Program ("FUSRAP") at a cost of up to $2.89 billion. U.S. Army Corps of Engineers, *Formerly Used Sites Remedial Action Program (FUSRAP): Report to Congress* 3 (1997). The Corps has clearly stated its intent to seek reimbursement of these cleanup costs from any private parties that may be liable for such costs under CERCLA. *Id.* at 32. Such cost recovery efforts by the federal government will almost certainly give rise to additional claims regarding the government's status as an "arranger" or "operator" that will be subject to the standards enunciated by the Ninth Circuit in this case.

Moreover, as discussed below, the Ninth Circuit's ruling may well affect even more broadly the determination of which non-governmental parties – including "arrangers," "operators" and others – are generally liable for cleaning up contaminated sites under the CERCLA program. There are thousands of contaminated sites around the country, not involving past activities of the government, that may give rise to claims for cost recovery or contribution under CERCLA. For example, as of October 1, 2002, there were 1,234 sites on the National Priorities List ("NPL"), which includes the sites that the U.S. Environmental Protection Agency ("EPA") has determined pose the highest risk to human health and the environment. *National Priorities List for Uncontrolled Hazardous Waste Sites*, 67 Fed. Reg. 65,315, 65,317-18 (2002). EPA has estimated that, through Fiscal Year 1998, potentially responsible parties had committed to conduct $15.5 billion in cleanups at such "Superfund"

sites while EPA itself has spent $16 billion to fund cleanups. General Accounting Office, *Superfund: Progress and Challenges*, Testimony of David G. Wood, Associate Director, Before the U.S. Senate Committee on Environment and Public Works 7 (1999). Moreover, a congressionally-authorized study recently concluded that the total cost to fund cleanups at these sites from Fiscal Year 2000 through Fiscal Year 2009 could be as much as an additional $18.3 billion. Resources For the Future, *Superfund's Future: What Will It Cost?* xxiii (2001). Thus, the amounts at stake in cost recovery and contribution claims under CERCLA will continue to be enormous and the issue of "arranger" liability will undoubtedly recur with frequency in connection with such claims even when the government is not a potentially responsible party.

In short, the decision of the Ninth Circuit in this case is likely to have wide-ranging impacts, potentially affecting the allocation of cleanup costs totaling billions of dollars at thousands of contaminated sites across the country. The issues raised by the Ninth Circuit's ruling are consequently of tremendous import for industry and for the nation as a whole.

B. The Ruling Will Affect Determinations of Liability In a Wide Variety of Contexts

The impact of the Ninth Circuit's decision will almost certainly extend beyond the bounds of "arranger" liability. For example, the criteria for determining the extent of liability in many other areas of CERCLA jurisprudence involve concepts of control or authority to control activities that are very similar to the standards for determining "arranger" liability under that law. In particular, the courts have held that liability as an "operator" under section 107(a) of CERCLA is

determined based on a party's actual control over a facility or its authority to control the disposal of hazardous substances. *See, e.g., East Bay*, 142 F.3d at 484-85. This test is very similar to the test established in some circuits for determining "arranger" liability, *see, e.g., TIC*, 68 F.3d at 1087-88, differing only in that the decision as to whether "operator" or "arranger" liability applies to a particular party generally depends on whether the hazardous substances were disposed of at the party's facility (resulting in possible "operator" liability) or at an off-site location (resulting in possible "arranger" liability). Thus, the Ninth Circuit's ruling likely will have substantial implications for determinations of "operator" liability under CERCLA as well.

The Ninth Circuit's ruling may also impact the CERCLA liability of many other parties - including financial institutions or commercial lenders, corporate parents, officers and directors - whose liability for cleanup costs may depend on the extent of their participation in the management of a facility or on their authority to control activities at a facility. For instance, CERCLA provides that commercial lenders may be held liable as "operators" if they participate in the management or operational affairs of a facility. *See* 42 U.S.C. § 9601(20)(F). Similarly, this Court has held that a corporate parent can be liable for disposal of hazardous substances by a subsidiary if the parent exercised a sufficient degree of control over the facility that produced the hazardous waste. *United States v. Bestfoods*, 524 U.S. 51, 71 (1998) ("*Bestfoods*"). *See also Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937 (8th Cir. 1995) (president of corporation held liable as an "operator" under CERCLA based on his control of facility operations).

The concept of imposing liability for the effects of pollution based on a party's control of, or authority to control, the facility generating the pollution even extends beyond CERCLA and is embodied in many other environmental statutes. For example, liability has been imposed on operators of facilities under the federal Resource Conservation and Recovery Act based on the extent of a party's control of or authority to control operations at a facility. *See United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1070 (D. Colo. 2000), *aff'd*, 303 F.3d 1232 (10th Cir. 2002) ("*Power Eng'g*"). Likewise, the courts have imposed "operator" liability for violations of the federal Clean Air Act on parties based on a significant degree of control over a facility. *See, e.g., United States v. Anthony Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 333 (3d Cir. 1998). In making these determinations, the courts have looked to decisions on "operator" liability under CERCLA - including this Court's decision in *Bestfoods* - in light of the similarities in language among environmental statutes and their shared broad remedial purposes. *See id.* at 334; *Power Eng'g*, 125 F. Supp. 2d at 1070 ("Although these tests have been devised to determine whether an individual or entity is an 'operator' under [CERCLA], there is no reason not to apply them to the 'operator' inquiry under the RCRA given the similarity of the definitions in both statutes."). Thus, it is reasonable to conclude that the Ninth Circuit's decision in this case, while arising in the context of "arranger" liability under CERCLA, may well have broader ramifications.

II. THE NINTH CIRCUIT RULING EXPOSES MANUFACTURING INDUSTRIES THAT DO BUSINESS WITH THE UNITED STATES TO UNREASONABLE AND INEQUITABLE RISKS OF LIABILITY

The ruling of the Ninth Circuit creates a significant and unreasonable risk that manufacturing industries, such as the petroleum and natural gas industry, that may be called on or encouraged to do business with the United States in order to further important national goals will be exposed to potentially enormous liability for environmental contamination that is largely attributable to the government itself. The Ninth Circuit's decision sends a clear message to manufacturing industries that the federal government will not take - and will not be required by the courts to take - responsibility for the long-term environmental consequences of activities undertaken by private industry at the behest of the United States, even where the government has made critical decisions and exercised substantial control over the activity resulting in the contamination. In so doing, the decision compounds the fundamental inequity of this result because it may put industry in the position of having no acceptable choice but to accept these liability risks.

At first glance, companies would appear to have at least two options in responding to the specter of multi-million dollar liabilities for environmental cleanup associated with production of equipment or material for the United States, *i.e.*, voluntarily accepting the risk of liability despite its unfairness, or simply refusing to do business with the United States. However, this is really a Hobson's choice. On the one hand, although a company could choose to accept the risk of liability for cleaning up

contamination that is ultimately the product of decisions made by the federal government, that outcome is decidedly inequitable and potentially enormously expensive. On the other hand, the alternative - avoiding liability by refusing to do business with the United States and thus refusing to contribute to national security or other important national goals - would be simply unacceptable for companies striving to be good corporate citizens. (In fact, the oil and natural gas industry's historic cooperation with the government during previous national crises demonstrates such a commitment to good corporate citizenship.) Moreover, the "option" of not doing business with the United States may be overshadowed, as it was during World War II, by the threat of government seizure of a facility that refuses to participate voluntarily in the government's efforts; or that "option" may simply not exist if the government has ordered the company to comply with government directives.[4]

The current war on terrorism and increased emphasis on homeland security demonstrate that the timing and nature of national emergencies cannot be predicted with any certainty. Industry may be called on at any time to provide necessary equipment or other materials to wage war, combat the effects of biological or chemical weapons or provide security for the nation's infrastructure. If industry plays its part in such situations

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[4] The United States in fact exercised both types of authority on occasion during World War II. *See, e.g., War Production Board*, 13 Geo. Wash. L. Rev. at 9-10 (discussing "compulsory orders which must be accepted under penalty of plant seizure and criminal sanctions"). Thus, in any future national emergency, potential government seizure of an industrial facility would not be seen as merely a hypothetical possibility.

willingly - as it has done consistently in the past - or is compelled by the government to provide essential goods and services, it should not be penalized by being forced to bear sole responsibility for multi-million dollar cleanups of environmental contamination largely attributable to the government's own decisions. Such an outcome undermines one of the primary goals of CERCLA - *i.e.*, the equitable distribution of cleanup costs. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1185 (9th Cir. 2000) ("To leave one party shouldering the entire cost of investigation and remediation while another rides for free frustrates th[e] goal [of imposing the ultimate cost of cleanup on the parties responsible for the contamination], rather than ensuring that those who caused the contamination pay their fair share of the costs associated with clean-up.")

Accordingly, the Court should grant the writs to address the impact of the Ninth Circuit's ruling in creating inequities in future commercial relations between vital industries and the federal government.

CONCLUSION

The decision of the Ninth Circuit will have potentially wide-ranging implications in determining who will bear the cost of cleaning up the legacy of decades of production efforts undertaken by industry on behalf of the United States to defend the country. In addition to its implications for activities undertaken in the past, the decision will also impact the relationship of industry and the federal government in the future, particularly in times of war or other national emergencies. Moreover, the decision could affect the scope of liability under CERCLA even more generally and may well affect the scope of liability under other

environmental statutes. Given the very significant import of the Ninth Circuit's decision, the Court should grant the writs in order to provide guidance to the lower courts on these critical issues.

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